IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

Petitioner,

—v.—

S. H. KRESS AND COMPANY,

Respondent.

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the District Court granting in part and denying in part respondent's motion for summary judgment is reported in 252 F. Supp. 140 and appears at A. 180.[1] The opinion of the Circuit Court of Appeals is unreported and appears at A. 201.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered December 27, 1968 (A. 200). This Court granted certiorari on May 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (Act of June 25, 1948, Ch. 646, 62 Stat. 928).

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[1] References to the separate appendix appear by page number following ("A. 00").

Questions Presented

1. Whether petitioner—denied food service at a Kress Hattiesburg Mississippi store because she, a white, was in the company of Negroes—was deprived by respondent, acting under "color of law," of rights secured to her by the constitution, as she alleges in a suit for damages brought pursuant to the fourteenth amendment and 42 U.S.C. §1983.

2. Whether the petitioner—denied food service at a Kress Hattiesburg Mississippi store because she, a white, was in the company of Negroes—was deprived by respondent, acting under "custom or usage," of rights secured to her by the constitution, as she alleges in a suit for damages brought pursuant to the fourteenth amendment and 42 U.S.C. §1983.

3. Whether petitioner, deprived of her constitutional rights as described in questions 1 and 2 above, is entitled to statutory damages against respondent pursuant to the Civil Rights Act of 1875, for being denied the right to the use of a public accommodation.

4. Whether summary judgment on the basis of affidavits and unsworn statements should have been granted against petitioner on her complaint of conspiracy between the respondent and the Hattiesburg Police in connection with the deprivation of her constitutional rights as described in questions 1 and 2 above.

5. Whether it was error and an abuse of discretion under all circumstances for the trial court to deny petitioner the

benefit of expert testimony as to custom and usage in Hattiesburg Mississippi in August 1964 regarding the serving of white persons in the company of Negroes where notice was given of the identity of the witnesses one day before trial.

Statutes Involved

The federal statutes involved are 42 U.S.C. §1983 [Act of April 20, 1871, Ch. 22 §1, 17 Stat. 13] and Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335], as are the thirteenth, the fourteenth and fifteenth amendments to the constitution.

Legislative acts of the Mississippi legislature involved are: Chapter 466, Senate Concurrent Resolution No. 125 (1956), Mississippi Code Sections 2046.5 (1956), 2056(7) (1954) and 4065.3 (1956). Pertinent statutory and constitutional provisions are set forth commencing at p. 51 of this brief.

Preliminary Statement

This is a law suit by a New York school teacher who was refused service discriminatorily in a public establishment in Mississippi offering food for sale and consumption because she, a white, was in the company of Negroes.

She sought damages pursuant to the fourteenth amendment and under 42 U.S.C. §1983 [this brief, pp. 51, 52] on the grounds that such discriminatory refusal of service was 1.) supported by state action in accord with a variety of legislative dictates passed by the Mississippi legislature in the later part of the 1950's which directed such discriminatory action on the part of private individuals as well as

public officials and 2.) supported by "custom or usage" as specified in the statute, the custom in Hattiesburg and other parts of the South being opposed to the social "mixing" of the races in public places.

In addition, the petitioner sought statutory damages under the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335, this brief pp. 52-56], declared unconstitutional in the *Civil Rights Cases,* 109 U.S. 3 (1883).

She further charged a conspiracy between municipal police officials and defendant Kress Co. based upon the *prima facie* showing that the Police of Hattiesburg had arrested her immediately following the discriminatory refusal of service by Kress, the Police charging her with vagrancy for having requested such service and for her involvement earlier that same day in an attempt to integrate the Hattiesburg Public Library in company with the same six black students whom she had escorted to the Kress store one-half hour later. In contrast to the court below, the Fifth Circuit Court of Appeals found that the criminal prosecution of this same plaintiff for having engaged in such rightful and lawful activity was "in violation of the express prohibition of Section 203 of the Civil Rights Act for rights granted [her] under Section 201." See, *Achtenberg, Adickes et al.* v. *State of Mississippi,* 393 F. 2d 468 (5 Cir., 1968).

Petitioner was foreclosed in the motion part from attempting to revive the Civil Rights Act of 1875 and from pursuing at trial her conspiracy allegations (A. 184, 185).

That court permitted her to go to trial on the issue of damages under 42 U.S.C. §1983 on the narrow grounds that Mississippi Code §2046.5 could furnish grounds for al-

leging "state action" because this code section "provides a criminal sanction against anyone who is requested to leave [a restaurant], but refuses to do so" (A. 183). That court further suggested that in order to establish "state action," petitioner would have to show that respondent had knowledge of Mississippi Code §2046.5 or was influenced by it (A. 183).

At the conclusion of the petitioner's case, the court directed a verdict for the defendant (A. 323).

Statement of the Case

Petitioner commenced this action on November 12, 1964, by the filing of a complaint predicated on the fourteenth amendment to the constitution and 42 U.S.C. §1983.

Allegations of the Complaint

Petitioner alleged that she is a resident of New York where she is a school teacher employed by the New York City schools. She alleged that the respondent is a New York corporation which maintains a store and lunch counter and booths for eating in Hattiesburg, Mississippi (A. 2).

In the summer of 1964, she volunteered to engage in the Mississippi Project sponsored by the Council of Federated Organizations, the purpose of which was to foster the integration of Negro citizens into the political and economic life of Mississippi and to improve their educational opportunities (A. 3).

On August 14, 1964, the petitioner accompanied by six Negro students entered the Hattiesburg public library, a

public institution maintained by the taxpayers of Hattiesburg, Mississippi. The Negro students requested the use of the facilities of the library. Their request was rejected, and they were told to leave. When they refused to do so, the library was closed by the Chief of Police (A. 3).

Petitioner and the students left the library and entered the premises of respondent's Hattiesburg store for the purpose of ordering lunch. A waitress employed by the respondent and acting in the course of her employment took the orders of the Negro youths. The waitress refused, however, to take the order of petitioner or to serve petitioner on the grounds that petitioner was a white person in the company of Negroes (A. 3, 4).

Petitioner was thereby discriminated against because of race and in violation of the constitution and 42 U.S.C. §1983. Petitioner alleged, therefore, that she was damaged in the sum of $50,000.00 (A. 4).

In her second cause of action, petitioner realleged the allegations of her first cause of action. In addition, she alleged that, while petitioner and the Negroes were in respondent's store, a uniformed policeman (identified in statements submitted by respondent, as Patrolman Hillman) acting under instructions of the Chief of Police entered respondent's store and thereafter, immediately upon petitioner's leaving the store, arrested her for vagrancy and took her into custody. On information and belief, petitioner alleged a conspiracy between the Chief of Police of Hattiesburg and the respondent to deprive her of her right to enjoy public accommodation because she had accompanied Negro students to the public library and thereafter sought to eat in their company in a public

place. In consequence of this capricious arrest—the result of joint action on the part of the respondent and the police officials of the City of Hattiesburg—the petitioner alleged that she suffered special damages by reason of her arrest and general damages in the sum of $500,000.00 (A. 4-6).

Pretrial Proceedings

After answer (A. 7, 8) the parties conducted pretrial discovery including the submitting of interrogatories and the taking of the deposition of the petitioner and the deposition of the respondent's store manager (A. 9-161).

Thereafter, on November 29, 1965, the respondent moved for summary judgment (A. 104). In support of that motion respondent relied on denials by the store manager of any conspiracy, and his affirmative assertion that he ordered the denial of service to petitioner because of an "explosive situation" and to avoid a riot (A. 135). In addition, the respondent submitted affidavits of two members of the police force and the Chief of Police denying any conspiracy (A. 107, 110, 113, 114).

In opposing the motion, petitioner relied on inferences to be drawn from the circumstances as set forth by her in her deposition (A. 62, 70, 72, 73, 77, 79). Petitioner also relied on two unsworn statements submitted by respondent which did not support and were in apparent contradiction to the main allegations of the deposition of the store manager and the affidavits of the Hattiesburg police officers. Irene Sullivan, an employee of respondent, stated she exchanged greetings with Patrolman Hillman when he entered the store while petitioner and the Negro students awaited service at their tables (A. 179); it was Patrolman Hillman

who arrested petitioner immediately thereafter when petitioner left the store (A. 110, 113). Dolores Freeman, the waitress employed by respondent who refused service to petitioner, made no reference in her statement to an "explosive situation" and merely said that she had followed orders in refusing service to petitioner (A. 178).

Petitioner cross-moved to amend her complaint alleging no new facts but specifically alleging that respondent's conduct was "under color of state law, custom and usage" and that it was specifically in conformity with Mississippi Code sections and a legislative concurrent resolution. She also sought to add a new cause of action under Sections 1 and 2 of the Civil Rights Act of 1875 and sought the statutory penalty of $500.00 for the respondent's discriminatory action (A. 161-168).

Ruling of the Court

After hearing before the Honorable Dudley B. Bonsal, the court upheld petitioner's cause of action as to the first count of her complaint on the narrow ground that the petitioner could recover if she could show that the respondent discriminated against her pursuant to a custom enforced by the state under Mississippi Code §2046.5. That section, only one of several set forth by the petitioner as evidencing Mississippi statutory approval of racially discriminatory practices in public places, provides that a proprietor of a public business may refuse to serve any person at his own discretion and that a person who enters such place must leave if requested or be guilty of trespass. [This brief pp. 62, 63.]

The court dismissed Count II of the complaint, which alleged a conspiracy between the respondent and the Hattiesburg police department, on the ground that the pretrial discovery procedure did not uncover any facts from which a conspiracy might be inferred (A. 183).

The court denied petitioner leave to add a third cause of action under Sections 1 and 2 of the Civil Rights Act of 1875, holding that those sections could apply only to an inn and could not apply to a lunch counter (A. 184).

On April 26, 1966, after Judge Bonsal had ruled, petitioner filed her Second Amended Complaint for Damages asserting on the basis of facts set forth in her initial complaint:

> "Defendant's action toward plaintiff as aforesaid in denying plaintiff service was under color of state law, custom and usage and was, in addition, pursuant to Mississippi Code Section 2046.5 (1956) . . . Such action of defendant is (sic) aforesaid represents a following of the custom of the community to segregate the races in public eating places and was effected to conform with such custom and usage" (A. 187, 188-190).

The Second Amended Complaint was duly answered —the respondent admitting that a waitress employed by the respondent took the orders of the Negro students but declined to take the order of the petitioner (A. 188-190).

Pretrial Order

Thereafter, on August 3, 1966, a pretrial order was entered providing, *inter alia,* that:

"(10) The waitress took the orders of the Negroes but refused to take the order of plaintiff (A. 191).

(11) The waitress, in refusing plaintiff service, was acting under express instructions from the store manager, Mr. Gordon T. Powell" (A. 191).

* * * * *

"A portion of the food served at the lunch counter has moved in interstate commerce" (A. 192).

Expert Witnesses Barred

The case was set for trial before the Honorable Charles H. Tenney to take place on February 14, 1967. One day prior to trial, petitioner, by written notice,[2] advised respondent of her intention of calling the Reverend Robert Beech of Hattiesburg, Mississippi, as an expert witness on the custom and usage in Hattiesburg, Mississippi, as to the serving of white persons in the company of Negroes on August 14, 1964. Also the day before trial, the petitioner orally advised the respondent of her intention of calling Andrew Gordon of the Rockefeller University as an expert witness on the same topic. That oral notice was later confirmed by a written proposed amendment of the plaintiff's trial memorandum.[3]

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[2] Plaintiff's Trial Memorandum p. 6 (R. 3, 4).

[3] This proposed amendment is unnumbered in the record as it was added by stipulation of counsel.

The trial court ruled, however, that the petitioner had not given "prompt notice" to respondent and denied petitioner permission to call such expert witnesses (A. 233).

Testimony at the Trial

At the trial, the petitioner testified that she was a school teacher in the New York City public school system and that she joined as a volunteer in the 1964 summer program in Mississippi of the Council of Federated Organizations which was to feature "freedom schools"—offering education in American history and civil rights—and voter registration in a general effort to foster the civil rights of the Negro citizens of the state. After a preliminary trip to Mississippi, Miss Adickes flew to Memphis for a three day orientation session and thereafter, on July 4, 1964, traveled to Hattiesburg, Mississippi, to begin her work in the summer program (A. 243-246).

Miss Adickes settled in a small rural Negro community outside of Hattiesburg, called Palmer's Crossing. There she joined other teachers at the Priest Creek Baptist Church in the instruction of eighty Negro students in the history of the American Negro, American social ideals and current events, including the passage of the 1964 Civil Rights Bill (A. 246-248).

During the first or second week of August, there came a time when the Negro students in petitioner's class talked about going some place together where they had not been permitted to go to before the passage of the 1964 Civil Rights Bill (A. 248, 249). In discussion outside the classroom and in the absence of petitioner, the students decided first to go to the "drive-in" motion-picture theatre in

Hattiesburg. They decided against this because of lack of transportation and because of anticipated danger in the isolated location of the drive-in theatre (A. 249).

After further discussion, the students decided to go to the Hattiesburg public library. The petitioner agreed to accompany them (A. 249).

On August 14, 1964, the petitioner and six Negro students—five girls and a boy—donned blue denim "freedom" shirts and took the bus from Palmer's Crossing for the half-hour ride to Hattiesburg and the library. The group entered the library and approached the desk and asked for library cards. Petitioner and her students sat down at the library desks and waited. After a half-hour, the Police Chief entered, questioned petitioner and then instructed the group to leave and they left (A. 250-251A).

After the petitioner and the six students left the library, they walked downtown, went to a Woolworth store, where they found the counter crowded, waited a few minutes and then left. Thereafter, they entered the respondent's store, where the group sat down in two empty booths—the petitioner sitting with three of the Negro students and the other three sharing the adjoining booth. Miss Adickes did not find the respondent's store crowded although there were a number of people in the store (A. 252).

After the group had waited for ten or fifteen minutes, a waitress appeared and distributed menus. The waitress took the orders of the three Negro youths accompanying petitioner, but did not take the petitioner's order. The group called the waitress back and when she returned the following conversation ensued:

Miss Adickes: "You haven't taken my order yet."
Waitress: "Well, I am not going to."

Miss Adickes: "Why not?"

Waitress: "Because my manager told me not to serve you."

Miss Adickes: "Do you realize that this is a violation of the Civil Rights Act?"

Waitress: "Yes, but my manager told me not to serve you. We have to serve the colored, but we are not going to serve the whites that come in with them" (A. 252, 253).

Thereafter, the petitioner asked for the manager's name and was told by the waitress that it was "Mr. Powell." The group in the other booth told the waitress that if she was not going to serve "Sandy," they did not wish to be served, and they all got up and left (A. 253).

The petitioner testified that the refusal to serve her "shocked" her. She had not anticipated such treatment because she understood that Kress was one of the places in town then serving Negroes. She also stated that "the denial provoked a kind of visceral reaction—there is a rejection, and you feel it, you feel it physically, or I felt it physically. At the same time, I was aware of the denial to me in the presence of students I had been working with all summer, and I also felt the larger significance of being—of everything I was there for, all that I was working for, indeed, all that I attempted to introduce into my teaching, all of this that I stood for was being rejected, being denied. And I felt a number of things—shock, humiliation, anger, and I guess a sense of the injustice of it" (A. 253).

The petitioner was further asked whether or not she had familiarized herself with the custom and usage in Hattiesburg of the general white community and specifi-

cally with the custom and usage as to the serving of white persons in the company of Negroes. She stated that she was familiar with such custom and usage. She gave particular attention to the relationship between the Negroes and white community and the custom and usage of the white community toward Negroes in the company of whites and whites in the company of Negroes. She further had occasion to observe personally and to have conversations with others as to the custom and usage in Hattiesburg. She concluded that it was the custom and usage there not to serve white persons in the company of Negroes (A. 254-257).

The petitioner also testified, in the face of the court's statement that such testimony was irrelevant, that there was a policy in Mississippi of "opposition to the mixing of the races" and that the attitude of the community toward persons who "mix with Negroes" is a hostile one. She testified that she had personally observed and experienced this policy (A. 301, 302).

The petitioner testified that she knew of another instance where Negroes and whites together had sought service in a drug store and that the whole group had been barred. She knew, however, of no other instance prior to August 14, 1964, where Negroes were offered service and a white person accompanying them was refused (A. 260). She also testified that she knew of instances of violence in Hattiesburg accompanying the association of whites and Negroes (A. 260).

Despite the custom and usage in the state, the petitioner testified that she thought that when they were in the respondent's establishment they were in one of the places

where the custom had been changed. Accordingly, she thought it would be appropriate for her students and herself to eat there together (A. 266).

Three of the Negro youths who had accompanied Miss Adickes on August 14, 1964, were called as witnesses. The first was Carolyn Moncure who testified that she was seventeen years of age and a freshman at Newcomb College in New Orleans and that she had been one of Miss Adickes' pupils at the Palmer's Crossing freedom school. Under instruction by Miss Adickes she had studied American Negro literature and joined in discussions of civil rights and the Civil Rights Act (A. 269, 270).

There came a time about the first part of August, when Miss Moncure and her fellow students talked about the possibility of going somewhere they had not gone to before the enactment of the Civil Rights Act of 1964. At first they contemplated going to a drive-in movie but decided this was dangerous. Alternatively, they decided to go to the Hattiesburg library. They revealed this determination to their teacher, Miss Adickes, on the Monday or Tuesday before Friday, August 14, 1964 (A. 270). Miss Adickes agreed to accompany the group.

The six Negro students and Miss Adickes left Palmer's Crossing for the half-hour bus trip to Hattiesburg at 11:30 on August 14, 1964. At the library, the group asked for library cards and were refused. Some time later, the Chief of Police came in and told them that the library was being closed (A. 271).

It being lunch time, the group went to Woolworth's; they found the eating place there crowded, so they went to the Kress store. There they found two empty booths and

sat down, three in one booth and four, including Miss Adickes, in the other; Miss Moncure was not in the booth with Miss Adickes. After about ten or fifteen minutes, a waitress came, gave them menus and took the orders in the other booth. Miss Moncure heard one of the girls call to the waitress to take Miss Adickes' order and she heard the waitress say she couldn't serve her because she had instructions from her manager not to serve whites who came in with Negroes. Accordingly, when the waitress came to Miss Moncure's booth, the children there said they didn't want anything either and they all got up and left (A. 271, 272).

Miss Moncure concluded her testimony on direct examination stating that she had seen no one do anything unusual while she was there other than what she described (A. 272).

On cross-examination, Miss Moncure stated that none of the group had anticipated violence or danger because they were dressed alike and that they had so appeared in Hattiesburg before, although not in the company of whites (A. 272). As of the day of their visit to the Kress store, she knew that Negroes had been served food there and she stated that she had previously had a coke there at the lunch counter in the company of Negroes (A. 275).

Miss Moncure further stated that she did not know of any occasion in Hattiesburg when a white person had been refused service, while Negroes accompanying such person had been offered service (A. 277).

Jimmela Stokes was the second Negro student called as witness by the petitioner. Miss Stokes stated that she was eighteen years of age, that she lived in Hattiesburg,

that she was currently a freshman studying sociology at Bishop College in Dallas, Texas, and that she had met Miss Adickes as a student in the freedom school at Palmer's Crossing (A. 278).

Her testimony corroborated that of the petitioner and Miss Moncure in all respects. In the course of her testimony, she said that when the group entered the library she saw a woman behind the library desk, talking on the telephone. The woman hung up as they came in, called another number and said "I need some help down here" Miss Stokes said to the librarian "The White Citizens Council told you not to serve us" and "If we can't use the library, then I don't think anyone should be able to use it." She further stated to the librarian "We'll stay" (A. 279).

At the Kress store, Miss Stokes sat down in a booth with two others and Miss Adickes. After fifteen minutes a waitress came over to take the orders and took all except that of Miss Adickes, whereupon Miss Stokes said "Hey, you forgot one." The waitress said "We are allowed to serve the colored, but not the whites who come in with them." When asked by Miss Adickes if she was refusing service the waitress said she was following the manager's orders because he had told her not to serve the whites who came in with Negroes (A. 280, 281).

In Miss Stokes' opinion, the store was not crowded, nor did anyone in the store do anything out of the ordinary (A. 281).

On cross-examination, Miss Stokes stated that she had previously eaten (she could not remember whether more than once) at the lunch counter in the respondent's Hatties-

burg store, that she had not been refused service but that she had not been with an integrated group. On the past occasion, or occasions, when she had eaten at the counter, the white people would get up and move (A. 281, 282).

On redirect, Miss Stokes testified that on previous occasions there had been a difference in the treatment accorded to her and to white people—that she had had to wait a good while for service, for as long as an hour. The questions which elicited those answers were objected to, the objection sustained and the testimony held to be irrelevant and the jury so instructed. But the testimony was not stricken from the record (A. 284-286).

Miss Stokes also testified on cross-examination that she was aware, on August 14, 1964, that there had been acts of violence in Hattiesburg and that white civil rights workers had been attacked and beaten. She said she knew, in answer to the cross-examiner's question, that "a large part of this [the violence] was directed towards the white civil workers in town in the company of Negroes" (A. 282).

She stated that she didn't, on the present occasion, expect violence and that there was no one inside or outside the Kress store doing anything unusual with respect to the group. Prior to that occasion, Miss Stokes had never been in a group with a white person where the Negroes were offered service and the white person refused (A. 283, 284).

The third Negro student to corroborate Miss Adickes' testimony was Diane Moncure, the sister of Carolyn Moncure. Miss Moncure testified that she was sixteen years of age, that she was a student at the John C. Freemont Senior High School in Los Angeles, California and that

she had met Miss Adickes at the beginning of freedom school on July 6, 1964 (A. 286). Her testimony corroborated that of the petitioner and of the petitioner's two other witnesses in all respects.

Miss Moncure also testified that she saw a police officer enter the store and that he stood and looked at her group as they sat in their places in the booths (A. 291).

Following Miss Diane Moncure's testimony, petitioner's counsel again attempted to bring in further testimony as to the custom and usage in Mississippi on August 14, 1964, by making an offer of proof as to what the two expert witnesses, the benefit of whose testimony she had been denied would testify (A. 293). The proof offered would show that the specific conduct of respondent sprang from the custom and usage against the "mixing"—the integration—of the races and that one way of expressing such custom would be to serve Negroes and refuse service to white persons in the company of Negroes (A. 294, 295).

In the colloquy that followed the court stated:

> "You are trying to convert what is an unfortunate situation into the nub of a lawsuit against a party that was just as aware, it seems to me, of the problem. Certainly it hasn't been disputed so far that they were one of the establishments in the community that were, maybe begrudgingly, but trying to comply with the law" (A. 296).

Counsel further stated that one of her proposed experts, Mr. Andrew Gordon, would testify to one kind of discrimination as in the instant case which occurred at a local theatre between July 2, and August 14, 1964, in Hattiesburg (A. 303, 304).

Before resting, the petitioner recalled Miss Carolyn Moncure who stated that she also observed a policeman enter Kress store five minutes after they arrived, pass the group—look back on them and go to the back of the store, come back and then leave (A. 302).

The court adhered to its initial ruling and denied petitioner the benefit of the testimony of the proposed experts [R. 163].

Court Directed Verdict

Thereafter, the court held that the petitioner had not offered any evidence upon which a jury could predicate a finding in her behalf and directed a verdict for the defendant (A. 322).

Summary of Argument

Petitioner, a white school-teacher, sought service in the company of five Negro children at a luncheon booth in the Kress store in Hattiesburg, Mississippi in August, 1964, twelve days after the passage of the Civil Rights Statute (42 U.S.C. 2000 et seq.). The group had just come from the Hattiesburg public library. The children, under escort of their teacher, had requested service there; in response, the librarian had summoned the Police who shut the library and ordered the group to leave. Petitioner was told by a Kress employee that she was being refused service because she, a white, was in the company of "colored." Immediately upon leaving the store, she was arrested by the Police for vagrancy.

Petitioner sued Kress in the United States District Court for the Southern District of New York, pursuant to the

fourteenth amendment and 42 U.S.C. §1983, for damages arising out of the denial of service and for damages arising out of her arrest for vagrancy pursuant, she alleged, to a conspiracy between respondent and the Hattiesburg Police. Petitioner also sought statutory damages for the denial of service under the Civil Rights Act of 1875 [Act of March 1, 1875, Ch. 114, 18 Stat. 335].

After preliminary motions, petitioner was permitted to go to trial only on her cause of action under 42 U.S.C. §1983 for damages arising from respondent's refusal to serve her.

The trial court denied petitioner the use of expert testimony as to the custom of serving whites in the company of Negroes because the identity of the witnesses was not disclosed until one day before trial. At the conclusion of the petitioner's case, the trial court granted a directed verdict on the grounds of her failure to show state action under 42 U.S.C. §1983.

Petitioner asserts that under the law she could show that the deprivation of her constitutional rights had occurred pursuant to "state action" pursuant to enactments by the legislature of the State of Mississippi which supplied "color of law" or pursuant to "custom" and "usage." Initially in her pleadings she alleged both and on the trial she proved both:

1. State action under "color of law" was demonstrated by a joint resolution of the legislature of the State of Mississippi and by a series of state laws enacted after this Court handed down its decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). In these enactments, the Mississippi legislature urged and required state officials

and private citizens to respect and follow the "segregation laws" of the state.

2. State action was demonstrated by custom and usage prevailing in the state and setting barriers against public acceptance of racially integrated groups. This was shown by testimony at the trial, and the lower court had judicial notice of such custom and usage from contemporaneous decisions of other federal courts sitting on cases arising in Mjssissippi and involving persons' rights to public accommodation.

Petitioner further contends that passage of the Civil Rights Act of 1964 and its interpretation in *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964) and *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) implicitly validated the Civil Rights Act of 1875 and overruled the *Civil Rights Cases,* 109 U.S. 3 (1883) as applied to denial of public accommodations in public eating places in 1964 so that, upon proof, she was entitled to the $500.00 statutory penalty for respondent's refusal to serve her.

Petitioner further asserts that it was error for the court on the basis of affidavits and unsworn statements, to grant respondent's motion for summary judgment against her complaint alleging conspiracy between respondent and the Police where the circumstances in and of themselves supported the inference of the conspiracy.

Finally petitioner asserts that it was an abuse of discretion for the trial court to deny her the benefit of expert testimony on the crucial issue of custom and usage in Hattiesburg in 1964 where notice of the identity of the witnesses was furnished one day before trial.

ARGUMENT

POINT I

Denial of the right of public accommodation to petitioner because she, a white, was in the company of Negroes was under color of law and constituted a violation of the fourteenth amendment and of 42 U.S.C. §1983.

The discriminatory refusal of the waitress to serve petitioner because she, a white person, was in the company of Negroes constitutes a deprivation of her rights to be served at a booth at a public lunch counter—a right secured by the constitution under the fourteenth amendment and 42 U.S.C. §1983, which provides:

"Civil action for deprivation of rights

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Petitioner maintains that the refusal to serve her was both "under color" of a state "statute" and also pursuant the "custom" and "usage" in Mississippi against the mixing of the races in public places; she maintains, further,

that the evidence she presented at the trial bore out such contention.[4]

Under this point, however, she will argue that legislation enacted by the Mississippi legislature, in apparent response to this Court's desegregation rulings in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), was sufficient in and of itself to constitute the "statute," "ordinance" or "regulation" specified in §1983.

Attached to petitioner's proposed amended complaint were sections of the Mississippi Code in effect in 1964— these being: Chapter 466, Senate Concurrent Resolution No. 125 (1956); Mississippi Code Section 4065.3 (1956) condemning and protesting the decisions of this Court on integration and deploring all similar decisions as being in violation of the Constitution of the United States and the State of Mississippi and declaring them to be of "no lawful effect," and directing officials of the state to prohibit "mixing" or integration of the white and Negro races in public places of amusement, recreation or assembly in the state; Mississippi Code Section 2056(7) (1954) which made it a crime to conspire "to overthrow or violate the segregation laws of this State," and Mississippi Code Section 2046.5 (1956) which expressly permits a proprietor of a lunch counter to refuse service to anyone at his option. The section defines as criminal trespass any refusal to leave the premises on the part of a person asked to leave (A. 169-177).

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[4] Petitioner will argue, *infra,* that she was unduly restricted in her proof by erroneous pre-trial rulings of the lower court as developed by Judge Waterman in his dissent in the court below. She contends, nonetheless, that even as limited, the proof adduced at trial of an evidentiary nature and that which the court was asked to judicially notice supported the allegations of her complaint and made out a *prima facie* case under 42 U.S.C. §1983.

On respondent's motion for summary judgment, Judge Bonsal in the District Court upheld petitioner's first cause of action but on the narrow ground that only one of the Mississippi legislative actions was pertinent—§2046.5. In fact, in subsequent rulings, Judge Bonsal denied petitioner the right to attach to her complaint *in haec verba* the other legislative provisions in support of her contention that her deprivation of rights was supported by state legislation (A. 185). This denial underscores the lower court's rejection of the amply documented fact that racial segregation is supported as a state policy in Mississippi by action of the state's legislature.

Judge Bonsal further confused the requirements of §1983 as to "custom" and state action, reading the federal law to mean that any custom must be enforced by state legislative action to give rise to a cause of action—viz:

> "Therefore, if plaintiff can show the defendant discriminated against her pursuant to a custom enforced by the State under Mississippi Code, §2046.5, of refusing service to whites in the company of Negroes, she will satisfy the state action requirement of 42 U.S.C. §1983" (A. 183).

The court below similarly disregarded the overall pattern of legislative support for segregation in the state when it said:

> "However, these 1956 enactments are clearly insufficient by themselves to prove that in 1964 Mississippi had a custom of separating the races in restaurants. *Williams* v. *Howard Johnson's Inc.*, 323 F. 2d 102, 106 (4th Cir. 1963); comment, 50 Cornell L.Q. 473, 494 (1965). The trespass statute, Mississippi Code §2046.4

is the only enactment not dealing with school integration and it, by itself, sheds no light on Mississippi customs and usages" (A. 206).

The court below, having arbitrarily dismissed the application of other Mississippi law urged by petitioner, found that the Mississippi criminal trespass law (§2046.5) was insufficient to support state action and in no way "encouraged the discrimination practiced by Kress" (A. 209). This holding involves a narrow construction of this Court's ruling in *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), and is at variance with the meaning given to state action both by the proponents of this and similar legislation in the Reconstruction Congress[5] and with the trend of the opinions of this Court in recent years. *Shelley* v. *Kraemer,* 334 U.S. 1, 19 (1948); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1961); *United States* v. *Price,* 383 U.S. 787 [See footnote pp. 794, 795] (1966); *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *Griffin* v. *Maryland,* 378 U.S. 130 (1964); cf. *Garner* v. *Louisiana,* 368 U.S. 157 (1961); W. Van Alstyne and K. Karst, "State Action and the National Interest in Racial Equality", 17 Stan. L. Rev. 3, 4 (1961); Lang "State Action and the Scope of Private Choice," 50 Cornell Q., 473 (1965). J. Silard, "A Constitutional Forecast: Demise of the 'State Action' Limit on the Equal Protection Guarantee," 66 Col. L.R. 855 (1966).

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[5] Language in the debates supporting the affirmative duty of the federal government through legislation to implement the thirteenth, fourteenth and fifteenth amendments is voluminous. See "The Reconstruction Amendments' Debates, as republished by the Virginia Commission on Constitutional Government (1967), pp. 494, 495, 496, 497, 502, 503, 511. Also see A. Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers L.R. (1967) 387, 394-396. J. Ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951), pp. 166-171.

This Court held in *Reitman,* following the reasoning of the California Supreme Court, that it will examine a state legislative action (there a state constitutional amendment) in terms of its immediate objective, its ultimate effect and its historical context and the conditions existing prior to its enactment, and struck down that state action which it found to be affirmatively designed to make private discrimination legally possible.

The court below distinguished the Mississippi Code sections as 1.) not a constitutional provision so not embodied in the state's "basic charter" and 2.) a mere neutral restatement of the common law allowing a restaurateur to serve whomever he pleases.

Against the dubious reasoning that led the Second Circuit to these findings, the dissent of Judge Waterman provides a careful analysis of common law concepts that erases the pedantic distinction between "innkeeper" and "victualler" and shows that a restaurateur under common law has an obligation to serve all comers (A. 222-224). Blackstone Commentaries 164 (Lewis ed., 1902) at 166. Furthermore, petitioner submits, the immediate historical record denies the comfortable finding of "neutrality" by the Second Circuit: Mississippi §2046.5 and the other legislation cited *supra,* were adopted by the state legislature after the decision by this Court in *Brown* v. *Board of Education, supra,* and are referred to as the "segregation laws of the state." Compare C. L. Black, "Foreword: State Action, Equal Protection and California Proposition 14," 81 H.L.R. 69 (1967); *Hunter* v. *Erickson,* Jan. 20, 1969, —— U.S. ——, 37 L.W. 4091.

Subsequent to Judge Bonsal's ruling and to trial of this case, but prior to the decision of the court below, the Court of Appeals for the Fifth Circuit had occasion to rule

on the facts in the instant case. *Achtenberg, Adickes, et al.* v. *State of Mississippi,* 393 F. 2d 468 (Feb. 5, 1968). Before that court petitioner sought removal (from state to federal jurisdiction under 28 U.S.C. §1443) of the trial of the charge of vagrancy brought against her after her arrest immediately upon her departure from the respondent's store. She sought such removal on the ground that the Mississippi vagrancy statute was being used to punish her for the exercise of rights declared in the Civil Rights Statute of 1964.

> "These petitions for removal together with the affidavits, clearly support the allegations in the petition that the conduct which caused the arrest of these five persons under the vagrancy statutes or ordinances of the state of Mississippi or the city of Hattiesburg, was conduct which was clearly protected under the provisions of Section 201 of the Civil Rights Act of 1964; attempts to enjoy equal public accommodations in the Hattiesburg City Library [The evidence shows that the Hattiesburg City Library was supported by city funds and that there was a policy of restricting it to white persons. It was thus an 'establishment or place' where 'such discrimination or segregation is or purports to be required by (a) law, statute, ordinance, regulation, rule, or order (of) State, agency or political subdivision there.' 42 U.S.C.A. §2000a-1, §202 Civil Rights Act, 1964.] and a restaurant in the nationally known Kress store."

That court held:

> "Here, the movants [petitioner Adickes was one of five] alleged in their petition for removal, *and proved on the hearing on the motion for removal,* that they

> were arrested for attempting to exercise the rights granted them under Section 201 of the Civil Rights Act of 1964 . . . the evidence being undisputed that the appellants were being prosecuted in violation of the express prohibitions of Section 203 of the Civil Rights Act for rights granted them under Section 201, the trial court should have dismissed the state prosecutions under the principle announced by The Supreme Court in *State of Georgia* v. *Rachel* [384 U.S. 808 (1966)]." pp. 474, 475.

These same facts were available to the trial courts below; those courts chose, however, to disregard the plain significance of these facts as set out by the Fifth Circuit.

POINT II

Denial of the right of public accommodation to petitioner because she, a white, was in the company of Negroes was pursuant to "custom" and "usage" and constituted a violation of the fourteenth amendment and of 42 U.S.C. §1983.

Judge Bonsal in his preliminary ruling on respondent's motion for summary judgment defined the "custom" involved in the case at bar as one "of refusing service to whites in the company of Negroes" (A. 183). Petitioner contended below that the action of refusing service to a white person was an expression of a custom and usage prevailing in the State of Mississippi against the "mixing" or integration of black and white skinned persons in public.

Judge Bonsal held that plaintiff could prevail at trial if she could "show the defendant discriminated against her pursuant to a custom enforced by the State under Missis-